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87-68

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., *et al.*,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TED L. PERRYMAN*
JOHN L. WALKER
ROBERTS, PERRYMAN & BOMKAMP, P.C.
1015 Locust Street, Suite 700
St. Louis, Missouri 63101
(314) 421-1850
Attorneys for Petitioners

* Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

The questions presented below involve the construction and constitutionality of two federal statutes known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, and the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901, *et seq.*

1. Whether CERCLA applies retroactively to hold non-negligent parties liable for cleanup costs of an inactive waste disposal site?

2. Whether RCRA applies retroactively to hold non-negligent parties liable for cleanup costs of an inactive waste disposal site?

3. If CERCLA and RCRA are applied retroactively, does the retroactive application violate Article I, Section 8 prohibiting standardless delegation of legislative authority; Article I, Section 9 prohibiting a "Bill of Attainder or ex post facto Law," or the Due Process Clause of the Fifth Amendment of the United States Constitution.

4. Whether a corporate officer may be held personally liable for his non-wrongful conduct while carrying out his responsibilities on behalf of the corporate entity?

5. Whether Congress intended to impose strict liability or negligence as the standard of care?

6. Whether petitioners are entitled to a trial by jury as guaranteed by the Seventh Amendment of the United States Constitution?

7. If petitioners are liable under CERCLA and RCRA, what costs are recoverable by the United States?

PARTIES

The other parties to this case are petitioners Edwin Michaels and John Lee. Defendant Ronald Mills was not represented by counsel in the district court and has not appealed. Defendant Syntex Agribusiness, Inc. settled with the government prior to trial. It filed an amicus curiae brief with the Court of Appeals, generally in support of petitioners' retroactivity arguments.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Northeastern Pharmaceutical and Chemical Company, Inc., Edwin Michaels and John Lee respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered December 31, 1986.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, A1 - A47) is reported at 810 F.2d 726. The opinion of the district court (App. D, infra, A50-A108) is reported at 579 F.Supp. 823.

JURISDICTION

The judgment of the court of appeals (App. B, infra, A48) was entered on December 31, 1986. A petition for rehearing was denied on April 8, 1987 (App. C, infra, A49). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, Sections 8 and 9 and the Fifth Amendment to the United States Constitution; section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. 96-510, 94 Stat. 2781, codified at 42 U.S.C. §9607; section 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended in 1980, Pub. L. 96-482, 92 Stat. 2348, codified at 42 U.S.C. §6973; and section 7003 of RCRA as amended in 1984, Pub. L. 98-616, 98 Stat. 3271, codified at 42 U.S.C. §6973.

STATEMENT OF THE CASE

The United States of America brought this action under section 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended in 1980, 42 U.S.C. §6973, and sections 104, 106(a), and 107(a) of the Comprehensive Environmental, Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§9604, 9606(a), and 9607(a) against Northeastern Pharmaceutical and Chemical Company, Inc. (NEPACCO), Edwin Michaels (Michaels), and John Lee (Lee), officers of NEPACCO, Ronald Mills (Mills), and Syntex Agribusiness, Inc. (Syntex), for the recovery of response costs incurred in cleaning up hazardous waste at the James Denney farm. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §1345, 42 U.S.C. §6973, and 42 U.S.C. §§9604, 9606(a) and 9613(b). A detailed statement of facts is set forth in the district court's memorandum opinion. (App. D, infra, A50-A108).

NEPACCO was organized and incorporated in Delaware in 1966 for the purpose of manufacturing pharmaceuticals, including hexachlorophene, a germicidal agent used widely by hospitals and physicians throughout the United States. In response to an order from the United States Food and Drug Administration limiting the use and sale of hexachlorophene, NEPACCO closed its operation and ceased doing business in 1972. In 1974 NEPACCO liquidated its assets pursuant to a stockholder approved liquidation plan. Although NEPACCO did not file a certificate of dissolution, the Delaware Secretary of State forfeited NEPACCO's charter to do business on August 22, 1976 and NEPACCO became a dissolved corporation.

During the time period in question, the individual defendants, Edwin Michaels and John Lee, were officers, directors and stockholders of NEPACCO. Defendant, Ronald Mills, was an independent contractor who contracted with NEPACCO to haul certain waste materials to a farm owned by James Denney. Mills was not represented by counsel in the underlying trial of this matter.

In 1971 NEPACCO was engaged in the production of hexachlorophene. Certain waste materials, including filter clays, second crop hexachlorophene, toluene, and unidentified liquid materials were placed in 55 gallon drums for disposal.

In July, 1971, defendant Mills approached plant manager, Bill Ray, concerning the removal and disposal of the drummed material referred to above. Ray discussed this proposal with Lee and Lee made suggestions concerning the soil characteristics desirable for disposal of filter clays and second crop hexachlorophene. Although there is a dispute as to the extent of Lee's involvement in approving of Mill's services and the selection of a disposal site, the district court found that Lee knew and approved of the proposed use of Mills' services and the disposal site. Michaels was not at the NEPACCO plant during

this time period and had no personal involvement in the selection of Mills or the disposal of drummed waste at the Denney farm.

In October of 1979 the Environmental Protection Agency (EPA) received an anonymous tip that waste material from the NEPACCO plant had been transported to the Denney farm. The EPA commenced an investigation and it found toluene, trichlorophenol (TCP), and 2,3,7,8-TCD (dioxin). Other remedial investigation and work was conducted by the EPA and in June, 1980 a temporary cap was placed over the trench where the drums were stored.

On August 1, 1980 the United States of America filed a complaint against NEPACCO, Michaels, Lee, Mills and Syntex pursuant to section 7003 of RCRA, 42 U.S.C. §6973 (1980) for the reimbursement of its response costs. On August 19, 1982 the United States filed a First Amended Complaint adding counts for relief pursuant to sections 104, 106(a) and 107(a) of CERCLA, 42 U.S.C. §§9604, 9606(a) and 9607(a).

On October 3, 1983, a non-jury trial was held before the Honorable Russell G. Clark. The district court issued its memorandum opinion on January 3, 1984, finding the defendants jointly and severally liable under section 107(a) of CERCLA, 42 U.S.C. §9607(a). On April 16, 1984, the district court entered an order of final judgment against the defendants in the amount of $155,171.93 (App. E, infra, A109-A111). The defendants' motion to alter or amend the judgment was denied on May 3, 1984. (App. F, infra, A112-A113). NEPACCO, Michaels and Lee timely filed a notice of appeal on June 27, 1984, (App. G, infra, A114), and the United States filed a notice of cross-appeal on June 29, 1984. (App. H, infra, A115).

On December 31, 1986, the United States Court of Appeals for the Eighth Circuit rendered its opinion (App. A, infra, A1-A47) and entered judgment (App. B, infra, A48). In a split decision the court of appeals affirmed in part, reversed in part

and remanded for further proceedings. In reversing the district court, the court of appeals held: (1) the United States can recover its pre-enactment costs under CERCLA; (2) section 7003 of RCRA imposes strict liability upon past off-site generators and transporters of hazardous substances; and (3) Michaels and Lee are personally liable under section 7003(a) of RCRA, 42 U.S.C. §6973(a) (Supp. 1986).

Judge John R. Gibson concurred with the majority in all aspects except the majority's holding that RCRA §7003(a), 42 U.S.C. §6973(a) (1982), imposes liability on past off-site non-negligent generators and its determination that the government could recover response costs from Michaels and Lee under section 7003(a). In dissent Judge Gibson stated:

> I think the 1984 House Conference Report is nothing more than a blatant effort by members of a later Congress to graft their personal views of the scope of liability under the RCRA onto the original act. It is bootstrapping, and the majority fail to recognize it as such. The Conference Report characterizes the 1984 amendments as "clarifying" the RCRA....The amendments to section 7003(a) are directed toward changing the scope of the section to reach past as well as present and future generators and transporters of hazardous waste. I believe this to be a substantive change, rather than a clarification. In any event, because the amendments did not relate to the "contributing to" language, the statements in the House Conference Report regarding the standard of liability under section 7003(a) — negligence versus strict liability — are wholly gratuitous.
>
> * * * *
>
> I would affirm [the district court's] reasonable conclusion that Congress did not intend to impose strict liability on past generators and transporters of hazardous waste. I would not accept at face value the assertion by certain

> members of the 98th Congress that they can divine the intent of the 94th Congress in enacting the RCRA some eight years earlier.

(App. A infra A45-A46)

NEPACCO, Michaels and Lee filed a petition for rehearing en banc and this was denied on April 8, 1987. (App. C, infra, A49). Judges John R. Gibson, the author of the dissenting opinion, and Theodore McMillian, the author of the majority opinion, would have granted the petition. This Court has jurisdiction by virtue of 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE PETITION

In order to understand the significance of this lawsuit, one need only examine the significance of the so-called Superfund Act. In 1980, when the legislation was signed by President Carter, the Environmental Protection Agency estimated that some 2,000 abandoned hazardous waste sites existed. Approximately $1.6 billion was appropriated to administer the clean-up of 400 sites considered to be the most hazardous to public health.

By 1985, the EPA recognized that it had grossly underestimated the scope of the problem and admitted that CERCLA and RCRA were inadequately drafted to meet its needs. The Office of Technology Assessment now estimates that there may be as many as 10,000 sites with a total cost projection of $100 billion. By 1990, the number of abandoned sites discovered will no doubt increase along with the resultant costs.

The Superfund program was initially scheduled for completion by 1985. The legislation was drafted based upon the assumption that cleanup was relatively inexpensive and involved scraping a few inches of soil off the ground. Unfortunately, the EPA failed to recognize that we are a society which buries its waste.

For decades we have buried our waste. This method of disposal was not only permitted, it was encouraged by governmental authorities. Even today, burial is the most prevelant method we use in disposing of our wastes. The historical prediliction to burial, coupled with our present practice, places a tremendous burden upon legislation which was enacted to resolve the problem.

As drafted, CERCLA and RCRA could not withstand the burden alone. The district court below recognized the inadequacies:

> "CERCLA is in fact a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation." (App. D, infra, A100).

Consequently, the EPA has prevailed upon the lower courts to "judicially construe" the statutes in order to support an otherwise tenuous foundation. In its petition, NEPACCO seeks a constitutional examination of the foundation.

This case was tried without a jury in October 1983. At that time, industry and environmentalists were closely monitoring the case since it was the first lawsuit to be tried on the merits under CERCLA and RCRA. The district court made detailed findings of fact upon which the case can be examined. Furthermore, the issues were presented on appeal before the Eighth Circuit Court of Appeals. The length of the appendix is testimony to efforts of the lower courts in grappling with the issues involved. The petitioners and the United States have fully exhausted their remedies. The record before the Court is complete and ripe for resolution.

Since its enactment in 1980, the Superfund Act has been litigated in virtually every circuit court of appeals. Not only has the United States filed hundreds of lawsuits, but many state and private actions have been maintained. A significant body of law has developed in the lower courts. These decisions are reported on a daily basis in journals and reporters specializing in toxic waste law. The legal literature dealing with CERCLA and RCRA has proliferated proportionately with the number of Superfund sites discovered. Notwithstanding the plethora of appellate and district court decisions, the Supreme Court has not heard or been requested to hear a case concerning the constitutionality of RCRA or CERCLA. This will be a case of first impression. Given the undisputed factual nature of the case and its involvement with only one site, the case lends itself to resolution by our highest court.

The importance of this case reaches beyond the litigants who have a financial interest at stake. However, one should not overlook its importance to petitioners, Michaels and Lee. Both have been held strictly liable for response costs in excess of $500,000. Their liability, in part, is premised upon their positions as officers of NEPACCO. In particular, Michaels was held responsible solely because he was president of the corporate entity. The United States conceded that he did not personally "arrange for" the disposal of waste. However, as a corporate officer he was held vicariously liable for the conduct of the corporation. When NEPACCO disposed of its waste in 1971, CERCLA or RCRA did not exist. No regulatory framework existed to control the burial of waste. More importantly, the technology concerning hazardous waste we rely upon in the 1980's did not exist in 1971. Yet, the United States and the EPA insist that Michaels and Lee be judged by today's standards. It is with 20-20 hindsight that liability is being imposed. For Ld Michaels and John Lee, it is being imposed unconstitutionally.

If the EPA is correct and some 10,000 abandoned sites exist, the number of Superfund actions will grow exponentially. By 1990, every chemical manufacturer in the United States will be involved directly or indirectly in a cleanup action. Since burial of wastes was the preferred choice, the entire industry is involved. Congress has enacted legislation which established a $1.6 billion fund to be used by the EPA for cleanup. The industry provided the funds for Congress through direct taxation.

In 1985, when the Superfund Amendments and Reauthorization Act of 1986 (SARA) was considered by Congress, congressional hearings concluded that the administration of the Superfund program undermined the intent of the program. It was found that the program "was victimized by gross mismanagement." After years of mismanagement, the EPA continues to file lawsuits seeking wide ranging remedies including money damages for reimbursement of its costs. The industry is once

again being taxed, but this time through litigation where the standard is one of liability without fault.

If the imposition of liability for practices engaged in decades ago fell upon the industry equally, it might be tolerated. Unfortunately, the United States seeks "joint and several liability" requiring those with assets to pay the entire cost. NEPACCO is defunct and has no assets. The burden is borne personally by Michaels and Lee.

The costs to both the industry and the public are astronomical. For example, the EPA has estimated that the cost to clean up Times Beach, Missouri by incinerating the dioxin contaminated soil to be in excess of $400 million. This is only one of 2,000 sites across the country in need of cleanup. If the legal issues are not resolved, the industry will have no choice but to litigate every site. The litigation will be endless.

Perhaps Congressman Harsha of Ohio was prophetic when he stated during debates on the Superfund Law of 1980:

> "These are not spurious issues...they are going to be litigated and the courts are going to have a field day ridiculing the Congress on passing laws that are vague, internally inconsistent...without any further guidance This bill is not a superfund bill, its a welfare and relief act for lawyers."

1 Committee on Environment and Public Works, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund),* Pub. L. 96-510, 1, 788-789 (1983).

The number of lawsuits, the astronomical costs associated with cleanup and the substantial constitutional questions inherent in the legislation itself, require that petitioners' writ be seriously considered.

Unfortunately, there are other equally important reasons why this case is appropriate for further consideration. Since its

enactment in 1980, CERCLA lawsuits have proliferated. Obviously, it is to the advantage of both the environment and the industry if cleanup of the sites can be carried out completely and expeditiously. In order for the EPA and potentially responsible parties to engage in meaningful negotiations leading to settlement, the parties must have a clear understanding of the law. At present, the EPA construes the legislation to incorporate absolute liability for any conduct which has occurred during the last century. Negotiations are seldom meaningful because the EPA refuses to concede that certain acts may not create liability or that some costs may not be recoverable. Accordingly, negotiations often conclude with the United States instituting a superfund action.

The certainty of the law not only fosters settlemets, it likewise is often determinative of who must bear the costs. In many cases, chemical manufacturers and transporters are insured. If the insurers have a clear understanding of the liability and costs, cases can be resolved without the necessity of a declaratory judgment action determining the rights of the insurer. Typically, when a chemical manufacturer is sued by the EPA a demand is made upon the insurer to defend and indemnify. Not knowing the extent of liability or responsibility for costs, the insurer denies coverage and a declaratory judgment action follows. Again, another round of litigation involving insurance coverage and the superfund act begins.

The final chapter on waste disposal and cleanup will not be written for decades. Congress has drafted the introduction through enactment of CERCLA and RCRA. As we begin to cleanup the nation's hazardous waste sites, we must have a mechanism that will afford due process to those who are targeted as responsible parties. As the number of discovered disposal sites grow and as the cleanup costs escalate, the need for due process becomes acute. Petitioners were denied due process of law for sake of expediency in dealing with a serious national problem. It is difficult for a lower court to declare that

RCRA and CERCLA apply prospectively or that a retroactive imposition of liability creates new liabilities resulting in a violation of due process. It is difficult because our environment and economy hang in the balance.

Petitioners appeal to the Supreme Court of the United States for a final hearing on the issues confronting not only the parties, but also the issues confronting our society as we begin to cleanup our nation. We begin by examining the retroactive application of CERCLA and RCRA.

1. **Retroactivity of CERCLA.** In general "rules of statutory construction...teach that the law is presumed, in the absence of clear expression to the contrary, to operate prospectively..." *Hassett v. Welch,* 303 U.S. 303, 314, 58 S.Ct. 559, 565 (1938). Congressional intent must be "unequivocal and inflexible" in order to impose liability retroactively. *Greene v. United States,* 376 U.S. 149, 160, 84 S.Ct. 615, 621-622 (1962). CERCLA became effective on December 11, 1980. 42 U.S.C. §9652(a). The conduct of NEPACCO occurred in July, 1971 when its waste was buried at the Denney farm site.

The statute is silent on the issue of retroactivity. The lower courts have seized upon certain "verb tenses" and the legislative history to support the conclusion that liability can be imposed retroactively. Section 107(a)(3) imposes liability on "any person who...*arranged*...for disposal." It is contended that the past tense use of the verb "arranged" manifests an intent by Congress for retroactive application.

By definition, the disposition of hazardous wastes must always precede the point in time at which a release or threatened release will occur. The only logical verb tense is the past tense since the disposer will always have "arranged" for liability-inducing disposal regardless of whether such arrangements were made before or after enactment of CERCLA. Indeed, in *State ex rel Brown v. Georgeoff,* 562 F.Supp. 1300, 1310 (N.D. Ohio

1983) the court pointed out that any argument which suggests the past-tense nature of "arranged" evidences retroactive application would serve to nullify any prospective application because it does not contain any present or future tense language. Accordingly, verb tenses alone are not a "clear expression" that liability be retroactively imposed.

The legislative history is likewise silent on whether Congress intended retroactive application. The original Senate bill, S.1480, did in fact expressly impose liability on "prior owners, lessees and generators, transporters, or disposers of...hazardous substances." However, the later markups and the final bill indicate that this language was expressly deleted from the liability provisions. A deletion of such an important provision "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corporation v. Copp Paving Co.*, 419 U.S. 186, 200, 95 S.Ct. 392, 401 (1974)

Contrary to the interpretation of the lower courts, CERCLA does not unequivocally or clearly manifest an intent by Congress to retroactively impose liability. The United States has not rebutted the presumption of prospective application and as a result petitioners seek review.

2. **Retroactivity of RCRA.** The district court held that petitioners were not liable under RCRA since it did not apply retroactively to past non-negligent generators. The court relied upon the statutory language and legislative history in refusing to impose liability retroactively.

The court of appeals reversed the district court on this issue by relying solely upon the 1984 amendments to RCRA which were enacted *after* the trial and district court opinion in this case. In the 1984 amendments, Congress specifically amended the statute to expressly provide for retroactive application. As Judge Gibson articulately stated in his dissent:

> "...the 1984 House Conference Report is nothing more than a blatant effort by members of a later Congress to graft their personal views of the scope of liability under RCRA onto the original act. It is bootstrapping, and the majority fail to recognize it as such."

Prior to the 1984 amendments, Congress debated a prior amendment in 1979. During the debate, the 1979 Congress stated:

> "The major criticism levied against (RCRA) is not corrective legislation but preventitive legislation. RCRA is not designed to cleanup the Love Canals of the United States, but to prevent future Love Canals." 1979 *Congressional Record.* S13243 (June 4, 1979)

In amending RCRA, Congress expressly stated that it was effecting a legislative reversal of the district court's holding. The concept of the legislature overruling a decision of the judiciary has been held unconstitutional. The framers of our Constitution recognized the "tyranny of shifting majorities" in the legislature. *I.N.S. v. Chadha,* ___ U.S. ___, 103 S.Ct. 2764, 2789 (1983) (J. Powell concurrence); *Buckley v. Valeo,* 424 U.S. 1, 138, 96 S.Ct. 612, 691 (1976).

3. **Due process retroactivity.** The Supreme Court has rendered two principle opinions on the constitutionality of retroactive federal statutes and on each occasion the retroactive application has withstood constitutional muster. *Pension Benefit Guaranty Corporation v. R.A. Gray and Co.,* 467 U.S. 717, 104 S.Ct. 2709 (1984), and *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 96 S.Ct. 2882 (1976).

In *Pension Benefit* and *Usery,* both statutes expressly and clearly contain language stating that they were to be applied retroactively. To the contrary, CERCLA contains no such language as discussed above.

Another important distinguishing characteristic concerns the nature of liability to be imposed. In *Usery* and *Pension Benefit*, the defendants had already been subjected to the same or similar "liability" at the time the statutes in question were enacted. The statutes in *Usery* and *Pension Benefit* were simply modifications and extensions of already existing law. Liability under CERCLA involves a new and wholly unexpected form of liability for anyone who was involved in the disposal of hazardous substances.

Although liability under CERCLA has been described as "strict liability", it is in effect, absolute liability as applied to this case. The lower courts took judicial notice that the substances found at the waste site were hazardous and as a result the United States needed to only prove that petitioners "arranged for the disposal" and that the hazardous substances "might present an imminent hazard or substantial endangerment."

Not only is liability absolute under the lower court's interpretation, causation in its traditional sense need not be proved. The plaintiff need only prove that it "might" cause a problem and it has met its burden. In practice, the United States can impose absolute liability for all costs by proving that petitioners' waste was disposed at a site 12 years ago which might some day cause a hazard. This interpretation not only operates as a new and wholly unexpected form of liability for those involved in hazardous waste, it likewise operates as a new cause of action unheard of at common law or in any statute imposing liability.

Retroactive liability under CERCLA is also violative of the Fifth Amendment due process clause because the statutory provision, by definition, is intended to act as a deterrent to improper disposal. As the Supreme Court noted in *Usery:*

> "We would nevertheless hesitate to approve the retroactive imposition of liability on any theory of deterrence." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 17, 96 S.Ct. at 2893.

Testimony at the debate surrounding the passage of CERCLA evidences the deterrent nature of the legislation. In particular, during hearings on a predecessor version of CERCLA, an EPA official made the following statement:

> "The deterrent aspects come from the fact that if the government spends money out of that fund that there is a recovery back against those who discharge, plus penalties. It is the liability provisions that are the deterrent." (Remarks of Thomas C. Jorling, assistant administrator for water and hazardous materials of the Environmental Protection Agency, at hearings on June 20, 1979 before the Senate Committee on environment and public works, subcommittees on research protection and environmental pollution).

Retroactive liability is particularly arbitrary and irrational when applied personally to individuals that are performing their functions on behalf of the corporate entity. For example, if an employee on one instance several years ago disposed of certain hazardous waste, he would be personally liable for "all costs" regardless of fault. Potentially, any person involved in the so-called "chain of disposal" would have liability under the lower court's interpretation of CERCLA.

The arguments pertinent to CERCLA are likewise applicable to RCRA. The United States maintains that petitioners are strictly or absolutely liable under RCRA for "contributing to" the disposal of hazardous waste. If that contention is adopted, the liability envisioned therein constitutes a "new and wholly unexpected form" of liabililty. As such, it is violative of petitioners' rights to due process of law under the Fifth Amendment.

4. **Individual liability of corporate officers.** Petitioners, Edwin Michaels and John Lee, were corporate officers of NEPACCO at the time the waste was disposed of in 1971. The

court of appeals recognized that Michaels had no personal involvement whatsoever in the disposal of waste at Denney's farm. Notwithstanding that recognition, he was held liable under RCRA because "he had ultimate authority to control the disposal of NEPACCO's hazardous substances." Thus, Michaels was held to be vicariously liable for the conduct of the corporation.

This construction of RCRA is not only contrary to the provisions of the Act, it is contrary to the common law. It is axiomatic that a corporation can be vicariously liable for the conduct of its officers. However, we turn the law inside out when we contend that an officer is liable for the conduct of the corporation. It is interesting to note that the district court found Michaels liable under CERCLA, but not RCRA. The court of appeals found the opposite by imposing liability under RCRA, but not CERCLA.

The legislative history discloses that "traditional and evolving principles of common law" are to be used in determining liability. As to Michaels, what is required is some showing of direct personal involvement. If a director does not directly participate in the corporation's wrongful conduct, common law does not subject him to liability simply by virtue of his office. *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 517 F.2d 1141, 1144 (4th Cir. 1975). Michaels was not involved in the negotiation of the disposal of waste nor did he approve such disposal. More importantly, Michaels was not even in Missouri when the material was arranged for disposal. There is no evidence whatsoever that Michaels had a direct personal involvement in the decision to dispose of waste at the site in question. Furthermore, he was not "contributing to" the disposal of hazardous waste since he had no personal involvement with this particular incident.

As to petitioner Lee, there are several reasons as to why liability should not be imposed. First, the United States did not allege nor did the trial court find that there was any tortious

conduct on the part of Lee or NEPACCO. The district court did find that Lee personally participated in the disposal in question. However, there was no allegation nor finding of fact that the participation was tortious or wrongful. To the contrary, liability was imposed "without fault." The concept of strict liability does not address personal blameworthiness. Strict liability is based upon the evaluation of a risk and the value of the activity to the community. There is no consideration of knowledge or personal invovlement when this legal concept is applied. All of the cases cited by the lower courts involve torts that have scienter or culpability as an element. Under the present posture, all officers and directors will be personally liable where the corporate entity is found liable on a theory of strict liability. Thus, the officers and directors of General Motors would be held individually liable for each design or manufacturing defect of every automobile if this were applied to a products liability case.

The policy behind holding an officer liable for the torts of a corporation is that he has participated in blameworthy activity, and the courts will not allow an officer to shield himself behind the corporate form for his own conduct. However, the trial court did not find that Michaels and Lee engaged in any blameworthy activity. Likewise, the district court did not find that NEPACCO had engaged in any blameworthy activity. An officer should not be held personally liable under a theory of strict liability for the corporation's conduct when conduct is not based upon any degree of blameworthiness.

Given the far reaching implications of individual liability under the court's interpretation of CERCLA and RCRA, we seek review from this Court in order to protect the rights and due process of Michaels and Lee.

5. **Standard and Scope of Liability.** Equally important to the Court's determination is the standard and scope of liability to be applied under section 107(a) of CERCLA, 42 U.S.C. §9607(a), and section 7003 of RCRA, 42 U.S.C. §6973. Cer-

tiorari should be granted to resolve issues which concern the construction of major federal statutes. *United States v. Donovan,* 429 U.S. 413, 422 (1977).

Early Senate proposals for strict, joint and several liability were omitted from the final version of CERCLA, raising the question of whether Congress intended for the standard of liability to be one of strict liability or negligence, and whether liability among defendants is to be joint and several. A clarification of the standard and scope of liability to be imposed under CERCLA would promote early and efficient settlement and cleanup of hazardous waste sites. *See Dupuy v. Dupuy,* 434 U.S. 911, 912 (1977) (White, J. dissenting from denial of writ of certiorari).

For similar reasons the Court should examine the standard and scope of liability under section 7003 of RCRA, 42 U.S.C. §6973. The district court determined that the legislative history to the 1980 amendments of RCRA required a finding of negligence to hold off-site generators and transporters liable under section 7003. (App. D, infra, A68). *Accord, United States v. Waste Industries, Inc.,* 556 F.Supp. 1301, 1308 (E.D.N.C. 1982), *rev'd on other grounds,* 734 F.2d 159 (4th Cir. 1984); *United States v. Wade,* 546 F.Supp. 785, 790 (E.D. Pa. 1982). The court of appeals reversed based upon the legislative history of the 1984 amendments to section 7003 which state that RCRA was always intended to reach past off-site generators and that the standard of liability was one of strict liability. (App. A, infra, A25-26).

In dissent, Judge John R. Gibson reasoned that the legislative history was a blatant attempt by some members of Congress to graft their personal views of the scope of liability under RCRA onto the original act, amounting to bootstrapping. (App. A, infra, A45). Indeed, the "clarifying amendments" did not address the crucial "contributing to" phrase and did not attempt to define this phrase. (App. A, infra, A45). This Court has

held that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one", *United States v. Price,* 361 U.S. 304, 313 (1960), and that "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumers Product Safety Commission v. GTE Sylvania,* 447 U.S. 102, 110 n.13 (1980).

It is imperative for the Court to resolve the conflict between the 1980 legislative history which would impose a standard of negligence on past off-site generators and the legislative history to the 1984 amendment which seeks to impose strict liability.

6. **Right to a jury trial.** Of extreme importance to the Court's consideration in granting a writ of certiorari is the issue of petitioners right to a jury trial.

The Seventh Amendment right to a jury trial attaches whenever "the action involves rights and remedies of the sort traditionally enforced in an action at law." *Pernell v. Southall Realty,* 461 U.S. 363, 375 (1974). The district court and court of appeals held that petitioners did not have a right to a jury trial as guaranteed by the Seventh Amendment because the United States was seeking equitable relief in the form of restitution. (App. A, infra, A43). Unfortunately, the courts have mistakenly equated "restitution" as being synonomous with equitable relief. Petitioners believe that the government's attempt at recovery of response costs is most closely analogous to general assumpsit, a legal form of action for restitution.

"Restitution" originated in the common law courts, but because of the difficulties associated with early common law procedures, suitors were driven to seek the aid of the equity courts. Restatement of Restitution, Part I, introductory note at 5 (1937). In the equity courts, restitutionary principles were developed in cases in which a fiduciary had failed to perform a duty to a third person, and in cases where a person was deprived

of property by fraud, mistake or duress and could not regain the property through the legal remedies then available. *Id.*, at 9.

In response to the expanding power of the Court of Chancery, the common law judges invented the remedy of general assumpsit. *Id.*, at 5-7. In its most common form general assumpsit lies where a party is unjustly enriched. The law courts imply a promise to pay by the person receiving the benefit. Restatement of Restitution, §5 comment a (1937). This is commonly called quasi contract. General assumpsit also includes the action for indebitatus assumpsit, which allows for the recovery of money where the obligation is imposed by an official, customary or statutory duty to pay money. Restatement of Restitution, Part I introductory note at 7; Shipman, *Handbook of Common Law Pleadings,* §§59, 62 (1923); Woodward, *The Law of Quasi Contract,* §§1,2,3 (1913).

The nature of recovery under CERCLA and RCRA is most closely analogous to quasi contract (unjust enrichment) or indebitatus assumpsit (statutory obligation to pay). Under the statutory framework of CERCLA and RCRA, if the government cannot force an abatement action against a defendant, then it must cleanup the site and seek recovery of response costs from that party. There is a statutory duty obligating the defendant to reimburse the Superfund. It may also be implied that a defendant promises to pay the government for a benefit incurred on it by the government in cleaning up a site (quasi contract). Restitutionary actions in equity usually lie where there is a breach of a fiduciary duty or where fraud, mistake and duress are involved. The equitable remedies do not fit the factual and statutory scheme of CERCLA and RCRA. General assumpsit is a "traditional legal remedy" wherein a jury trial is guaranteed.

The preceeding summary of common law pleading is intended to demonstrate that "the obligation to pay money" imposed by CERCLA is not exclusively an equitable remedy and, as a

result, invokes the requirements of the Seventh Amendment. An equally important rationale for imposing a jury trial requirement is the type of "remedy" which was obtained by the plaintiff in the district court. Joint and several strict liability was imposed on two individuals because of their non-negligent conduct as officers of a corporation. While it may ultimately be determined that CERCLA has such breadth and scope, the sweeping nature of such a determination demands that it should be imposed by a jury. The trial by jury is the last "buffer" between defendants and their government. When a citizen is being sued by its own government under a statute created by its own government in a court established by its own government, the citizen is entitled to a trial by jury.

The petitioners would also direct the Court's attention to *Continental V. N.E. Pharm. & Chem. Co.,* 811 F.2d 1180 (8th Cir. 1987) (*rehearing en banc* granted), where the court of appeals, in a related insurance coverage case, held that response costs under CERCLA are compensatory damages within the meaning of the CGL policy. In dissent, Judge Theodore McMillian noted that the majority's holding, making response costs legal damages, was in conflict to the holding of *United States v. NEPACCO,* (App. A, infra, A1) where it was held that response costs constituted equitable monetary relief. If response costs are legal damages and covered by insurance, then the petitioners are entitled to a jury trial. Alternatively, if response costs are equitable damages, then there is no coverage under the insurance policy. The impact of such a finding on insurance companies and individual defendants is obvious. Many defendants would be forced into bankruptcy if there is no insurance coverage. The Court must determine which interpretation is correct at this early stage so that petitioners will not be denied their right to a jury trial.

7. **Recoverable costs under CERCLA and RCRA.** A final reason for granting the petitioners' writ concerns the important issue of what response costs are recoverable under CERCLA and RCRA. Under CERCLA the Court is confronted with the issues of what type of response costs are recoverable by the government; whether there is a presumption that response costs incurred by the government are consistent with the National Contingency Plan (NCP); whether there is a presumption that the response costs incurred by the government are reasonable; and who bears the burden of proving consistency and reasonableness. Also included is the issue of whether the government can recover response costs incurred prior to CERCLA's effective date and, if so, who bears the burden of proving reasonableness or consistency when there was no NCP at the time to provide guidelines.

Under RCRA, there are no restrictions that response costs be consistent with the NCP or that they be reasonable. If RCRA allows for the recovery of response costs which petitioners deny, then such cost recovery devolves purely from the court's equitable discretion and places the burden on plaintiff in proving its damages.

The court of appeals affirmed the district court's ruling that under CERCLA there is a presumption that the government's actions are consistent with the NCP, despite the fact that the NCP was not in existence at the time the government incurred the majority of its response costs. The court of appeals' holding is not supported by statutory rules of construction or by the legislative history to CERCLA.

Presumptions arise where human experience reveals that certain basic facts, if believed, can by the process of inferential reasoning lead to a related factual conclusion that is "compulsory" if the basic facts are accepted as true. Because of this mandatory effect, there must be some logical connection between the basic and presumed fact. The consequences must be

so highly probable that it saves time by assuming the presumed fact to be true. Petitioners argue that there is no logical connection between costs incurred and consistency with the NCP, nor is it highly probable that the costs are consistent with the plan. Placing the burden of disproving the government's damages on the petitioners places an undue burden on the petitioners where the facts are peculiarly within the possession of the government. Presumptions are created to correct imbalances resulting from one party's superior access to proof. McCormick, *Law of Evidence,* §343 (2d ed. Cleary 1972). Presumptions may also be created by legislative fiat. Ther is nothing in the legislative history to indicate that Congress intended to create such a presumption.

These reasons also hold true for the appellate court's affirmance that CERCLA provides an irrebuttable presumption that response costs incurred by the government are reasonable. Common law requires a plaintiff show that its damages are related to injury and a reasonable reflection of the costs incurred. An irrebuttable presumption provides the government with a "blank check" and removes its methods of cleanup, investigation and expenditures from public scrutiny. Surely, this was not the intent of Congress.

The petitioners would also draw the Court's attention to the court of appeals reversal of the district court on the issue of recovery of pre-enactment costs. The district court held the government could not recover its pre-enactment costs. (App. D, infra, A76). *Accord, United States v. Wade,* 20 Env't Rep. Cases (BNA) 1849, 1850-51 (E.D. Pa. 1984). The court of appeals reversed a holding that CERCLA authorized recovery of pre-enactment response costs. Resolution of this conflict is important not only to the petitioners but to other parties who may be held liable for pre-CERCLA response costs.

The court of appeals, in authorizing recovery of pre-enactment response costs, failed to provide guidance as to

which party has the burden of proving response costs. In this case the majority of response costs were incurred prior to CERCLA's enactment. There was no NCP in existence at the time these costs were incurred. The petitioners argue that in the event pre-CERCLA response costs are recoverable, the government has the burden of proving that its costs are necessary and reasonable, and would be consistent with the NCP.

CONCLUSION

Based upon the significance of the issues presented and their constitutional ramifications in this case of first impression, petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit. Furthermore, petitioners request that briefs be submitted with oral argument.

Respectfully submitted,

Ted L. Perryman*
John L. Walker
Roberts, Perryman & Bomkamp, P.C.
1015 Locust Street, Suite 700
St. Louis, Missouri 63101
(314) 421-1850

Attorneys for Petitioners

*Counsel of Record